United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76-1331

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1331

UNITED STATES OF AMERICA,
Appellee,

—v.—

URBAN J. DIDIER, a/k/a "HARP,"
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION BY THE UNITED STATES OF AMERICA FOR REHEARING

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America,

JOHN P. COONEY, JR.,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

The United States of America respectfully petitions for rehearing of the decision of the Court, Docket No. 76-1331, filed October 13, 1976, reversing the defendant's convictions for conspiracy to transport stolen securities in interstate commerce and causing stolen securities to be transported in interstate commerce, in violation of Title 18, United States Code, Sections 2314, 2315 and 2. The Court directed that the underlying indictment be remanded to the district court for dismissal.

Statement of the Case

This Court reversed Didier's conviction on the grounds that the delay between Didier's first trial, which ended in a mistrial, and his retrial violated the Southern District Plan for Achieving Prompt Disposition of Criminal Cases

(hereinafter "The Southern District Rules"). The Court held that the delay from the end of the first trial on December 3, 1973, until February 11, 1975, the date of the Court's decision in *United States* v. *Drummond*, 511 F.2d 1049 (2d Cir. 1975), "was for the most part excusable" because "the government might reasonably have believed," during pre-*Drummond* confusion, that the Second Circuit Rules Regarding Prompt Disposition (the "Second Circuit Rules"), which required only readiness for retrial rather than actual commencement of the trial, were applicable. (Slip. Op. at 81). Further, the Court concedes that a portion of the subsequent delay up to September 2, 1975, was excusable since Didier himself was without counsel during a portion of that period and had not informed the District Court of that situation.* (Slip. Op. at 84).

However, the Court ruled that the delay thereafter was entirely unwarranted and, apparently, resulted in a cumulation of time in excess of that allowable under the

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* During this period after *Drummond*, the Court stated that the Government made only a "half hearted" attempt to retry Didier within the 90 days" and points to the fact that the Government's offer requesting a trial as soon as possible was not sent until March 25, 1975, 42 days after *Drummond*. (Slip Op. at 83). The Government respectfully submits that the characterization is not supported by the record. Instead, the Assistant United States Attorney then in charge of this prosecution attempted to contact the district judge shortly after *Drummond* in order to obtain a trial date. However, Judge Cooper was outside the district until March 14, 1975. (App. 21). Thus, unless Didier was willing to waive venue and be tried in a distant district, the Government's request was addressed to the Court 11 days after the soonest possible date Didier could be retried in Southern District of New York. This, we submit was clearly an "exceptional circumstance" that was excludable from the running of the period. *United States* v. *Rollins*, 475 F.2d 1108 F.2d (2d Cir. 1973).

Southern District Rules.* Slip. Op. at 84. In rejecting the Government's contention that "good cause" existed for delay from August 8, 1975, when the co-defendant became a fugitive, until retrial, the Court ruled that Judge Cooper erred in following the procedure set forth in *United States* v. *Lasker*, 481 F.2d 229 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1975), by granting an adjournment for a reasonable period to obtain the presence of his co-defendant Ashdown and placing the burden upon Didier to move for severance. In particular, this panel held that the District Court's reliance on *Lasker* was erroneous since that decision related to the Second Circuit Rules and was inapplicable to the Southern District Rules. (Slip. Op. 85). In limiting the *Lasker* decision, the panel pointed out the dissimilarity of certain provisions of the Southern District and Second Circuit Rules, specifically, the provisions of the Southern District Rules relating to the court's sole responsibility for setting and calling cases to trial, Rule 9(a), and that concerning the lack of a re-

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* The Court does not indicate in its opinion what portion of the 90 day period remained as of September 2, 1975. However, the Court ruled that the periods prior to *United States* v. *Drummond, supra*, and, under Rule 5 (g) of the Southern District Rules, the period while Didier was without an attorney, were excusable. Since Didier first appeared with his new attorney on June 12, 1975 (App. 23), that date appears to be the date at which the unexcused portion of delay prior to September 2, 1975 commenced. Obviously had Didier been tried on September 2, 1975, he would have been tried within 82 days of the time this attorney exclusion expired. Didier was not tried on that date because of Ashdown's intervening fugitivity. Pursuant to the Court's decision, then, the salient question is whether the adjournment at August 21, 1975 was proper. From June 12, 1975 until August 21, 1975, the date at which the Court, relying on the *Lasker* decision granted an adjournment to find the fugitive Ashdown (App. 60) was a period of 70 days. If the District Court was correct in its reliance upon the *Lasker* exclusion, 20 days of the permissible 90 day period remained, without regard to exclusions while motions were pending, see Point II *infra*, and without regard to the issue of whether the District Court's order was effect *nunc pro tunc* to the time of Ashdown's fugitivity on July 17, 1975.

quirement on the part of the defendant to make a demand to invoke his speedy rights, Rule 8. Because of these dissimilarities, the panel concluded that Judge Cooper's reliance on *Lasker* was "misplaced." (Slip. Op. at 85, n. 9). Rather than the *Lasker* procedure, the procedure suggested by the Court was to seek a waiver from Didier before the permissible 90 day period had expired and, whether or not said waivers had been obtained, to ask permission of the court for a specific period of additional delay.* (Slip. Op. at 86).

Additionally the Court concluded that the period specified by Rule 6 was not tolled by the pendency of appellant's motion to dismiss on a speedy trial grounds because tolling would penalize defendants for making such motions. (Slip. Op. at 84).

Reasons for this Petition

The Government respectfully suggests that this panel should rehear this case for two reasons.

First, the lynchpin of the panel's opinion is that during the crucial period after Ashdown became a fugitive, the Government and District Court failed to follow proper "procedural safeguards" under the Southern District Rules and erred in following the procedure set forth in *Lasker*. The Government respectfully submits that the retroactive emasculation of *Lasker*—upon which both the Government and the District Court justifiably relied—is without support in the relevant Southern District Rules and is diametrically opposed to prior decisions of this Court.

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* The only authority cited for this suggested procedure is the Southern District Plan for Prompt Disposition of Criminal Cases (hereinafter "the Current Rules") which did not go into effect until July 1, 1976, three months after the re-trial in this case. (Slip. Op. 86, at note 11.)

Second, the Court's holding that the period while speedy trial motions are *sub judice* is not excludable is contrary to specific provisions of the Southern District rules and to the dictates of common sense.

ARGUMENT

POINT I

Lasker prescribed the "procedural safeguards" under the Southern District Rules and was properly followed in this case.

The Court's conclusion that its prior decision in *United States* v. *Lasker*, *supra*, should be limited to the now-superseded Second Circuit rules and that *Lasker* does not prescribe the appropriate "procedural safeguards" to be followed in the event of the fugitivity of a co-defendant under the Southern District Rules contradicts not only the *Lasker* opinion itself but also specific language in Judge Mansfield's own opinion in *United States* v. *Bowman*, 493 F.2d 594 (2d Cir. 1974).

Judge Lumbard, writing for the Court in *Lasker*, specifically held that, although that case arose under the Second Circuit Rules, it was equally applicable to the Southern District Rules.

> "The Second Circuit's Rules Regarding the Prompt Disposition of Criminal Cases were superseded, effective April 1, 1973, by Plans for Achieving Prompt Disposition of Criminal Cases for each of the six districts in the circuit. These Plans were adopted in accordance with Rule 50(b), F. R. Crim. P. The Prompt Disposition Rules that are relevant to this decision remain unchanged in the Plans of each of the districts. Therefore, *although this case is governed by the prior Prompt Disposition Rules, the decision bears also on the proper*

> *interpretation of the District Plans.*" 481 F.2d at 232, n.1. (Emphasis added)

More recently, in *United States* v. *Bowman, supra*, Judge Mansfield reaffirmed the general precedential value of decisions under the Second Circuit Rules to questions arising under the Southern District Rules, and reasserted the vitality of *Lasker* in particular. Judge Mansfield opined that "[s]ince the Southern District's Plan adopted many of the Second Circuit Rules . . . almost verbatim, court decisions dealing with the [Second Circuit] Rules are for the most part applicable here." 493 F.2d at 595-596, n.1. As authority for this proposition, Judge Lumbard's footnote in *Lasker*, quoted above, was cited. *Id.*

Since Rule 5(e), the exclusionary provision identified by Judge Lumbard in *Lasker* as controlling,* reappeared in identical form in the Southern District Rules ** *Lasker* defined the "procedural safeguards" to be taken in this case.

Relying on the *Lasker* decision, Judge Cooper granted an adjournment in this case in order for the Government to have a reasonable time to locate the fugitive co-defend-

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* The language of Rule 5(e) of the Second Circuit Rules was included *verbatim* in Rule 5(e) of the Southern District Rules effective April 1, 1973 and in Rule 6(e) of the Southern District Rules effecitve September 29, 1975 (hereinafter "the 1975 Southern District Rules").

** Judge Lumbard specifically rejected the assertion made by the appellant in *Lasker* and implicit in this panel's opinion (Slip. Op. at 85) that requiring a defendant to request severance under Rule 5(e) violates the provisions of the Speedy Trial Rules (Rules 8, 7, and 8 of the Second Circuit, Southern District and 1975 Southern District Rules respectively) that makes a demand unnecessary on the part of the defendant to invoke the rules' protections. 481 F.2d at 234. As to Rule 9 (a) of the Southern District Rules, Judge Lumbard tacitly rejected this Court's later conclusion that it bears upon the procedure to be followed by the district court.

ant.* Didier was notified of this adjournment and its reason and invited to contact the Court if he objected.** When Didier finally did object on February 20, 1976, Judge Cooper—again, pursuant to *Lasker*—determined that further delay beyond March 8, 1976, would be unreasonable, ruling that even if Ashdown remained unavailable on that date, a severance would be granted to Didier and the trial would proceed.*** Clearly, the final

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* This panel suggests that the District Court should *sua sponte* have severed Didier when Ashdown became a fugitive (Slip Op. at 83). This was clearly a matter of discretion with the district judge and cannot be characterized as plain error. See *United States* v. *Rollins*, 487 F.2d 409, 413 n. 8 (2d Cir. 1973). At any rate, this Court had previously held in *Lasker* that the failure of a district court to take the initiative to order a severance should not result in the dismissal of an indictment. 481 F.2d at 234. Furthermore, the panel's holding that the burden should not be on the defendant to move for a severance is utterly inconsistent with the specific language in *United States* v. *Cangiano*, 491 F.2d 906, 909 (2d Cir.), *cert. denied*, 419 U.S. 904 (1974), that "it is unrealistic to expect the Government to take the initiative to move for a severance."

** The procedure suggested by this panel of obtaining the permission of the District Court for the additional delay *prior* to the running of the permissible period was specifically rejected by this Court in *Lasker* as inconsistent with the term of Rule 5(e): ". . . it would involve strained logic to say that applications for exclusions under Rule 5 must be made to the district court before the elapse of the . . . [90 day] period." 481 F.1d at 233. See also the specific language rejecting this panel's logic in *United States* v. *Rollins*, 475 F.2d 1109, 1110-1111 (2d Cir. 1973).

*** The Court suggests that the 1975 Rules bear upon this case. It should be noted that unlike the Current Plan, these rules did not indicate by their terms that their effect was retroactive. Moreover, such a retroactive application would have put the Government in default on September 30, 1975, in cases where retrial had been ordered more than 60 days before that date. Thus, it is respectfully suggested that these rules were prospective in their effect and Rule 7 relates only to retrials ordered after September 29, 1975.

At any rate, even if Rule 7 did apply, the retrial was scheduled for March 8, 1976 or 121 days of its effective date, less than the 180 days allowable. The trial did not in fact take place until 196 days on Didier's own request. It would mock justice to allow that request to determine the question of his culpability.

delay from March 8, 1976, until actual commencement of the retrial was excusable and for good cause under the law then in effect in this district, since it was at the specific request of Didier.

In sum, this panel reached its conclusion only by overruling—or at least by emasculating—the specific procedures set forth in *Lasker*.* Since the grounds of this retroactive narrowing—that is, the limitation of *Lasker* to the superseded Second Circuit rules—was specifically rejected not only by the *Lasker* opinion but by the writer of the *Didier* opinion himself in *United States* v. *Bowman*, *supra*, we submit that both the Government and the District Court reasonably relied on the *Lasker* procedures and should not be charged with foreseeing this panel's revision of it. A contrary conclusion will only result in the very "mousetrap", 481 F.2d at 233, of the Government and the trial courts that the *Lasker* court sought to avoid. Thus, we submit that rehearing of this decision is warranted.**

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* This panel recognized that its interpretation of *Lasker* was crucial to its conclusion. "Had the government and the district court observed these procedural safeguards, it is unlikely that events would have reached the point where reversal would be required." Slip Op. at 87.

** The importance of rehearing is underlined by two further considerations. First, the panel's decision can in any event have no impact on the way such cases are handled in the future. As the panel noted, Slip Op. at 87, the Current Rules set out in detail missing from the earlier rules the precise procedures to be followed in calculating exclusions from the time periods mandated by the rules. See Rule 10(a) and (b); Title 18, United States Code, Section 3161(h). Thus, the decision will have only retrospective effect on cases involving rules now already superseded.

Second, the decision will have an adverse impact on cases now pending on appeal that we submit is both meaningless and unwarranted. Informal search has indicated at least one other case

[Footnote continued on following page]

POINT II

Under the Southern District Rules, the period during which motions to dismiss the indictment are *sub judice* is excludable.

The Court held that the periods during which a motion to dismiss an indictment on speedy trial basis is *sub judice* is not excluded from the permissible 90 days (Slip op. at 84).

This ruling directly contradicts the exclusion set forth in Rule 5(a) of the Southern District Rules:

> The period of delay while proceedings concerning the defendant are pending, including but not limited to . . . pre-trial motions . . . and the period during which such matters are sub judice.*

The Court does not cite, nor has the Government been able to find, any decision that supports a conclusion that this exclusion does not mean exactly what it says, that *all* pretrial motions while *sub judice* toll the permissible period.

Indeed, Rule 4** which desribes the procedure for determination of speedy trial motions, further supports a conclusion that the pendency of such motions tolls the period. The Rule states that if a period longer than that permissible has arguably run, nonetheless 10 days notice for the motion is required. Thus, if the permis-

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now pending in this Court in which the validity of the *Lasker* procedures is questioned. We submit that wholesale release from culpability of guilty defendants because the Government and the District Court relied on past decisions of this Court is simply unfair.

* To the extent that it is relevant, identical language is contained in Rule 6(a) of the 1975 Rules.

** Identical language to that of Rule 4 is contained in Rule 5 of the 1975 Rules.

sible period were exceeded when the motions were made, and the exclusion upon which the Government relies were for less than 10 days, the making of the motion itself with the specified notice would put the Government in default.* Further, the provision that these motions be decided with the "utmost promptness" is an obvious accommodation to the concern voiced by the panel, that the defendants not be "penalized" for making such a motion.

Clearly, in light of the clear language of Rule 5(a), the periods when Didier's motions to dismiss were *sub judice* should be excluded from the permissible 90 day period.

CONCLUSION

The opinion of the court should be modified to affirm the conviction of Urban J. Didier.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for the United States of America,

JOHN P. COONEY, JR.,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

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* In the context of the 90 day provision, it is particularly important that motion periods be excluded as last minute motions prior to retrial could put court in dilemma of either holding such a motion in abeyance until after trial or taking time to decide in such a way as to put the Government in default. *Cf. United States* v. *Padilla-Martinez*, 538 F.2d 921 (2d Cir. 1976).

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

JOHN P. COONEY, JR. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of October, 1976 he served a copy of the within PETITION FOR REHEARING
2 copies
by placing the same in a properly postpaid franked envelope addressed:

JULIA HEIT, ESQ.
EDWARD MASRY, ESQ.
142 EAST 16TH STREET
NEW YORK, NEW YORK

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

John P. Cooney Jr.
JOHN P. COONEY, JR.
ASSISTANT UNITED STATES ATTORNEY

Sworn to before me this
27th day of October, 1976.

Robert J. Costello
ROBERT J. COSTELLO
NOTARY PUBLIC, State of New York
No. 41-4509892
Qualified in Queens County
Commission Expires March 30, 1977